UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISS FACILITY SERVICES, INC.	
Petitioner,	**Case No. _____**
v.	
NATIONAL LABOR RELATIONS BOARD	**PETITION FOR REVIEW**
Respondent.	

ISS FACILITY SERVICES, INC.'S PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ISS Facility Services, Inc. ("ISS") hereby petitions the United States Court of Appeals for the Fifth Circuit for review of the Order of the Respondent National Labor Relations Board in NLRB case 28-CA-126024, entered on April 7, 2016, finding that ISS engaged in unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (the "Order"). ISS requests that the Order be set aside or modified.

This Court has jurisdiction because the Board's decision is a final order within the meaning of 29 U.S.C. § 160(f) of the National Labor Relations Act, and ISS is an aggrieved party. Venue properly lies in this Court under 29 U.S.C. § 160(f) because ISS's headquarters are in San Antonio, Texas, and ISS transacts

business in the Fifth Circuit. A copy of the Order is attached hereto as Exhibit A. ISS's Rule 26.1 Corporate Disclosure Statement is attached as Exhibit B.

Dated: April 27, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2016, I caused a copy of the foregoing Petition for Review of an Order of the National Labor Relations Board to be served upon.

Court and time stamped copy, by hand delivery:

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EXHIBIT A

ISS Facility Services, Inc. *and* United Food and Commercial Workers Union, Local 99. Case 28–CA–126024

April 7, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

Upon charges filed on April 4 and June 26, 2014, by the Union, the General Counsel issued a complaint and notice of hearing on June 30, 2014, alleging that the Respondent has been violating Section 8(a)(1) of the National Labor Relations Act since about October 4, 2013, by maintaining on overly broad and discriminatory mandatory arbitration agreement that: (1) requires employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial; and (2) interferes with employees' access to the Board and its processes.

On August 27, 2014, the Respondent, the Charging Party, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On December 1, 2014, the Board granted the parties' joint motion. Thereafter, the General Counsel and the Respondent each filed a brief, and the Respondent filed a responsive brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and a place of business in Phoenix, Arizona, has been engaged in providing janitorial services at Phoenix's Sky Harbor Airport, pursuant to a contract with the City of Phoenix. In conducting its operations during the 12-month period ending April 4, 2014, the Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Arizona, and the Respondent has derived gross revenues in excess of $500,000. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

Since about October 4, 2013, the Respondent has maintained the Mutual Agreement to Arbitrate Claims (MAAC or Agreement) as a condition of its employees' employment. The MAAC is applicable to all employees employed by the Respondent at the Respondent's facility and at Phoenix's Sky Harbor Airport. The Respondent's employees are required to sign and date a copy of the MAAC.

The MAAC states, in relevant part:

> **All disputes covered by this Agreement between EMPLOYEE and EMPLOYER shall be decided by an arbitrator through arbitration and not by way of court or jury trial.** (Emphasis in original).
>
> . . .
>
> (2) . . . Except as otherwise provided herein, this Agreement applies, without limitation, to any claims arising out of or related to EMPLOYEE's employment or separation of employment . . . .
>
> . . .
>
> (5) Regardless of any other terms in this Agreement, claims may be brought before and remedies awarded by an administrative agency if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission, the U.S. Department of Labor, or the National Labor Relations Board. . . .
>
> . . .
>
> (6) EMPLOYER AND EMPLOYEE hereby waive any right for any dispute to be brought, heard, decided, or arbitrated as a class and/or collective action ("Class Action Waiver"). Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any instance in which the claim is brought as a class and/or collective action. . . . Notwithstanding this Class Action Waiver and the Representative Action Waiver, EMPLOYER and EMPLOYEE agree that EMPLOYEE is not waiving rights under Section 7 of the National Labor Relations Act and that EMPLOYEE will not be retaliated against, disciplined, or threatened with discipline if EMPLOYEE exercises any such rights. EMPLOYER, however, may lawfully seek enforcement of this Class Action Waiver and/or

Representative Action Waiver under the Federal Arbitration Act and seek dismissal of any class, collective or representative action claims.

B. Discussion

The Board held in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1 (2014), enf. denied __ F.3d __ (5th Cir. Oct. 26, 2015), that an employer violates Section 8(a)(1) "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Additionally, an employer violates Section 8(a)(1) if employees would reasonably believe that its arbitration policy interferes with their ability to file a Board charge or to access the Board's processes. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

Here, we find that the Respondent violated Section 8(a)(1) by maintaining the MAAC. First, we find that the Respondent's arbitration policy is facially unlawful under *D. R. Horton* and *Murphy Oil*, supra. Like the policies in those cases, the Respondent's arbitration policy requires employees, as a condition of their employment, to submit their employment-related legal claims to individual arbitration, thereby compelling employees to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral and judicial.[1] See *Murphy Oil*, 361 NLRB No. 72, slip op. at 1; *D. R. Horton*, 357 NLRB at 2277.

In addition, we find that the MAAC independently violates Section 8(a)(1) by interfering with employees' right to file charges with the Board. The Board applies its *Lutheran Heritage Village-Livonia* test to determine whether a reasonable employee would construe the MAAC to prohibit the filing of Board charges, raising the prospect that the employee would be chilled from doing so. 343 NLRB 646, 647 (2004). In making that determination, the Board recognizes that "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint." *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994). As a result, the Board routinely has found insufficient language in workplace rules purporting to except, or "save," employees' legal rights from restrictions on their conduct. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5 and fn. 18 (and cases cited therein) (2015). This is so even where such exceptions referred to the "NLRA" or "the National Labor Relations Act." See id. at 5 and fn. 19 (and cases cited therein). "The rationale underlying these decisions is that, absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights." Id. at 5.

The MAAC suffers from this vagueness, even with the provision stating that the agreement does not prohibit the filing of Board charges. The MAAC specifically applies to "any claims" arising out of an employee's employment and waives "any right" for "any dispute" to be arbitrated on a class or representative basis, thereby conveying to employees that, as a condition of employment, they must forfeit their substantive Section 7 right to act collectively in pursuing an employment dispute in any other forum. The Respondent and the dissent assert that employees would not reasonably construe the MAAC to interfere with an employee's right to file charges with the Board because it specifically states that filing charges with the Board is permitted. Their assertions, however, overlook the confusing language in the MAAC stating that the filing of Board charges is permitted "if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." In *SolarCity*, the Board found that a virtually identical caveat could not reasonably be understood by employees as having no effect on their right to file Board charges. See 363 NLRB No. 83, slip op. at 5 fn. 20. Thus, applying the *Lutheran Heritage* framework and for the reasons provided in *SolarCity*, slip op. at 5–6, we find that employees would reasonably understand the vague, unexplained MAAC language to be coercive and, as a result, would be restrained in exercising their Section 7 right to

[1] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the MAAC does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The MAAC is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the MAAC unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

file charges with the Board out of fear that doing so would run afoul of the vague caveat discussed above.[2]

Moreover, we find that even if an employee could determine from the MAAC that he could invoke the Board's processes, an inherent ambiguity in the MAAC suggests that he must do it individually, and not in concert with other employees. The MAAC's class, collective, or representative action waiver requires the individual to waive "any right for any dispute to be brought, heard, decided, or arbitrated" on a class, collective, or representative basis. As in *SolarCity*, this broad language clearly encompasses filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective action. 363 NLRB No. 83, slip op. at 6. And it would be unclear to the reader, especially one without specialized legal knowledge, whether and to what extent the MAAC's exception for filing charges with Federal agencies modifies the previous broad prohibition on pursuing any form of collective or representative activity, particularly since the exception does not clarify that such charges may be filed on an individual or collective basis. This ambiguity would lead a reasonable employee to question whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus serves as another reason for finding the MAAC to unlawfully interfere with employees' right to file charges with the Board.

Finally, our finding that the MAAC is unlawful effectuates the Congressional policy of vigorously safeguarding access to the Board's processes. The Board and the courts have long recognized that "filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7." *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011). For this reason, the Board must take care to ensure that employer rules do not chill employees from filing charges with the Board and instead are clear that employees retain the "complete freedom" that Congress sought.[3] In our view, the MAAC here fails in this fundamental respect.

[2] Contrary to the dissent, we have not contravened the *Lutheran Heritage* test by "selectively focus[ing]" on the MAAC's caveat to the exclusion of subsequent language stating that filing charges with the Board is permitted. As indicated in *Lutheran Heritage*, supra, 343 NLRB at 647, workplace rules like the MAAC here are to be "read as a whole" in construing their legality. We have done exactly that by examining the language relating to the filing of charges in the MAAC in context with the language of the caveat.

[3] *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board or to access the Board's processes, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall also order the Respondent to rescind or revise its arbitration policy and to notify employees that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, ISS Facility Services, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the Mutual Agreement to Arbitrate Claims (MAAC) in all of its forms, or revise it in all of its forms to make clear to employees that the MAAC does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the MAAC in any form that it has been rescinded or revised

and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at all Phoenix, Arizona facilities where the MAAC applied copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent since October 4, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 7, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, the Respondent and its employees entered into the Mutual Agreement to Arbitrate Claims (MAAC), which provides for the arbitration of non-NLRA employment-related claims, and under which employees waive the right to pursue such claims through class or collective actions. The MAAC specifically excludes from its scope the filing of charges with the National Labor Relations Board (NLRB or Board). Relying on the majority opinion in *Murphy Oil*,[1] my colleagues find that the Respondent violated Section 8(a)(1) of the Act by maintaining the MAAC because it contains a class-action waiver. Relying on *Lutheran Heritage Village–Livonia*[2] and *SolarCity*,[3] my colleagues additionally find the MAAC unlawful on the basis that employees would reasonably believe it interferes with their right to file charges with the Board. For the reasons set forth below, I respectfully dissent.[4]

1. *The class-action waiver is not unlawful.* I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[5] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

[2] 343 NLRB 646 (2004).

[3] *SolarCity Corp.*, 363 NLRB No. 83 (2015).

[4] In analyzing whether an arbitration agreement is unlawfully overbroad with respect to whether employees may file Board charges, the Board has applied the first prong of the *Lutheran Heritage* standard, i.e., whether "employees would reasonably construe the language [of the agreement] to prohibit Section 7 activity." 343 NLRB at 647. See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (quoting *Lutheran Heritage*, supra), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). As I explained in my partial dissenting opinion in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), enfd. mem. sub nom. *Three D, LLC v. NLRB*, No. 14–3284, -3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015), I would reexamine this standard in an appropriate future case, but here, even under the *Lutheran Heritage* standard, I believe the MAAC should be found lawful.

[5] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, the MAAC expressly states that "[n]otwithstanding this Class Action Waiver, EMPLOYER and EMPLOYEE agree that EMPLOYEE is not waiving rights under Section 7 of the National Labor Relations Act." There is no allegation that the Respondent has retaliated against any employee for engaging in protected concerted activity in connection with any class or collective action, and the MAAC makes explicit that "EMPLOYEE will not be retaliated against, disciplined, or threatened with discipline if EMPLOYEE exercises any . . . rights" under Section 7 of the Act.

Murphy Oil, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[6] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[7] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[8] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[9] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

2. *The MAAC does not interfere with NLRB charge filing*. Nor do I agree that the MAAC violates Section 8(a)(1) by interfering with the filing of Board charges or their resolution by the Board. In my view, any reasonable construction of the MAAC reveals that it excludes the filing of NLRB charges from its scope. The MAAC states that it applies to "any" disputes, "past, present or future," that employees may have with their employer, but these statements are qualified so as to make clear they are subject to certain exceptions.[10] The MAAC then explicitly informs employees that they retain the right to file charges with the NLRB.[11]

I agree that an employment agreement may constitute unlawful interference with NLRA-protected rights to the extent that it purports to limit the right of employees to file charges with the Board.[12] However, the MAAC does not limit this right. The Fifth Circuit reached precisely the same conclusion based on similar facts in *Murphy Oil USA, Inc. v. NLRB*, above. Although the court agreed that the employer's original arbitration agreement violated NLRA Section 8(a)(1) because it broadly required arbitration of "any claims" with no language that permitted the filing of NLRB charges, 808 F.3d at 1019, the court held lawful a revised agreement that stated: "[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]," id. at 1019–1020 (alterations in original). Based on this provision, the court held that, reading the agreement "as a whole, it would be unreasonable for an employee to construe the

[6] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[7] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[8] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[9] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[10] Thus, the MAAC includes the clause "[e]xcept as otherwise provided in this Agreement."

[11] The MAAC states: "Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board."

[12] See, e.g., *GameStop Corp.*, 363 NLRB No. 89, slip op. at 4–7 (2015) (Member Miscimarra, concurring in part and dissenting in part); *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite." Id. at 1020.

Notwithstanding express language to the contrary, my colleagues find the MAAC *prohibits* filing charges with the Board. They purport to apply prong one of the *Lutheran Heritage* test—i.e., whether a reasonable employee would construe the MAAC to prohibit charge filing—but *Lutheran Heritage* contradicts their analysis. There, the Board held that a policy, rule or employee handbook provision would be deemed unlawful when "employees would reasonably construe the language to prohibit Section 7 activity," and the Board expressly warned against "presum[ing] improper interference" with Section 7 rights and finding interference "simply because the rule *could* be interpreted" that way.[13] My colleagues base their finding on what they deem to be ambiguity in the MAAC, but the MAAC is not ambiguous. After stating that "claims may be brought before and remedies awarded by an administrative agency if, and only if, applicable law permits access to such an agency notwithstanding the existence the existence of an agreement to arbitrate," the MAAC makes clear that "[s]uch administrative claims *include* without limitation *claims or charges brought before . . . the National Labor Relations Board*" (emphasis added). In other words, "claims or charges brought before . . . the National Labor Relations Board" are included within the class of claims that "may be brought before . . . an administrative agency." No other reasonable interpretation is possible.[14]

My colleagues pursue an analysis that prompts one to wonder whether *any* language would suffice to protect NLRB charge filing, even when an arbitration agreement expressly indicates that employees may file charges with the Board. As I have just explained, the agreement at issue here provides that claims that "may be brought before . . . an administrative agency . . . . *include . . . claims or charges brought before . . . the National Labor Relations Board.*" Nonetheless, my colleagues, relying on cases they cited in *SolarCity*,[15] find this language no more effective than generalized savings clauses that have been discounted or disregarded by the Board. In these cases, the Board has applied the sound principle that an otherwise illegal rule will not be rendered lawful based on language that would predictably be understood only by someone with specialized legal knowledge.[16] However, the relevant provisions in the MAAC merely require the ability to read and understand the English language.[17] In this respect, I believe my colleagues turn precedent upside down. Every employee who reads English would understand the MAAC has no impact on NLRB charge filing, since this is precisely what the MAAC says, while my colleagues devise an implausible interpretation that, in my view, could *only* be advocated or adopted by lawyers.

Contrary to the majority, I do not believe the MAAC contains language that is vague, unexplained, or ambiguous so as to warrant a finding that the MAAC unlawfully interferes with an employee's right to file charges with the Board. Here, my colleagues advance two rationales, neither of which is sufficient, in my view, to establish a violation of Section 8(a)(1).

First, my colleagues selectively focus on language broadly stating that the MAAC applies to "any claims" and waives "any right" for "any dispute" to be arbitrated on a class or collective basis, plus other language excluding the filing of Board charges from this broadly inclusive language "if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate"—a clause they characterize as "vague" and "unexplained." But the majority's analysis fails to quote the relevant language of the MAAC in its entirety, as follows:

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[13] *Lutheran Heritage*, 343 NLRB at 646–647.

[14] Even if the MAAC were ambiguous, mere ambiguity is not enough under *Lutheran Heritage* to condemn a rule as unlawful. The word *ambiguous* means "capable of being understood in two or more possible senses or ways." http://www.merriam-webster.com/dictionary/ambiguous. Thus, a rule is ambiguous if it *could* be read to prohibit Section 7 activity, among other possible interpretations, regardless whether employees reasonably *would* read it that way.

[15] 363 NLRB No. 83, slip op. at 5 & fn. 18.

[16] For example, in *McDonnell Douglas Corp.*, 240 NLRB 794 (1979), the Board found a facially overbroad no-distribution rule unlawful despite an exception for distribution "protected by Section 7 of the National Labor Relations Act." Id. at 802. That exception was insufficient to save the rule because an employee would need to know what distribution Section 7 protects to understand what the exception allows. Here, the language in the MAAC expressly permits NLRB charge filing, and that language is self-explanatory. There is nothing else an employee needs to know to understand it. In *Hoot Winc, LLC*, 363 NLRB No. 2 (2015), the only case my colleagues cited in *SolarCity* that involved an arbitration agreement or filing charges with the Board, the Board found an exclusion for "any dispute that cannot be arbitrated as a matter of law" insufficient to inform employees that they could still file Board charges on the basis that Board charges *can* be resolved through arbitration. Id., slip op. at 1–2. And unlike here, the agreement in *Hoot Winc* did not inform employees of their right to file Board charges.

[17] Although the MAAC list statutes and refers to some concepts with which some employees may be unfamiliar, this is not materially different from many collective-bargaining agreements, which are routinely deemed enforceable by the Board and the courts even if they incorporate concepts that are expressed in "general and flexible terms," Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959), or are based on practices that may be "unknown, except in hazy form, even to the negotiators," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–581 (1960).

> Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission, the U.S. Department of Labor, or the National Labor Relations Board.

My colleagues cannot and do not dispute that *some* claims are excluded from the MAAC. After all, the MAAC states that "[r]egardless of any other terms of this Agreement, *claims may be brought before . . . an administrative agency* if . . . applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." My colleagues' point is that many employees would not know whether the NLRB is an administrative agency access to which is permitted by "applicable law . . . notwithstanding the existence of an agreement to arbitrate." I agree. However, the majority ignores the very next sentence, which explains that "[s]uch administrative claims"—i.e., claims that "may be brought before . . . an administrative agency"—"*include . . . claims or charges brought before the . . . National Labor Relations Board*" (emphasis added). My colleagues' analysis, though relying on *Lutheran Heritage*, contravenes principles set forth in that decision, which stated it was improper to rely on "particular phrases in isolation" and to "presume improper interference with employee rights."[18] It simply is not true that the language of the MAAC, read as a whole, is "vague" or "unexplained." No further explanation is required to make clear that the MAAC protects bringing "claims or charges . . . before . . . the National Labor Relations Board."

Second, even though the MAAC expressly states employees retain the right to bring "claims or charges . . . before . . . the National Labor Relations Board," my colleagues make a three-stage argument[19] that the class-action waiver in the MAAC creates "an inherent ambiguity" because (i) the MAAC states that employees waive "any right for any dispute to be brought, heard, decided, or arbitrated" on a class, collective or representative basis, (ii) an NLRB charge sometimes "purports to speak to a group or collective action," and (iii) the MAAC's class-action waiver would interfere with the right to file these types of Board charges. The problem with this argument is its false, circular premise that the MAAC's class-action waiver can be construed to interfere with the filing of Board charges, despite other language in the MAAC that specifically addresses Board charge filing and contradicts such a construction. As noted previously, the MAAC categorically *permits* the filing of Board charges—all Board charges, including those that "purport[] to speak to a group or collective action." Here as well, only lawyers could argue for the interpretation reflected in my colleagues' three-stage "inherent ambiguity" analysis. As the Fifth Circuit stated in *Murphy Oil USA, Inc. v. NLRB,* above, "it would be unreasonable for an employee to construe the [MAAC] as prohibiting the filing of Board charges when the agreement says the opposite."

The protection afforded to Board charge filing is important because the filing of a charge is prerequisite to Board review of unfair labor practice issues.[20] Consequently, an agreement that prohibits filing Board charges violates Section 8(a)(1) if entered into by an employer, and Section 8(b)(1)(A) if entered into by a union.[21] My colleagues and I agree that the Board should safeguard the right to file charges with the Board. In the instant case, however, the MAAC clearly states it does not impose any restriction on the right to file Board charges. Therefore, I believe the Board cannot reasonably conclude that the MAAC unlawfully interferes with Board charge filing in violation of Section 8(a)(1).

Accordingly, for the reasons explained above, I respectfully dissent.

Dated, Washington, D.C. April 7, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[18] *Lutheran Heritage*, 343 NLRB at 646.

[19] The majority presents this argument without separating it into three stages. However, I believe the majority's argument is difficult to understand without breaking it into its component parts, and it consists of the three elements set forth in the text.

[20] See *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152, 162–163 (4th Cir. 2013) ("The NLRB serves expressly reactive roles: conducting representation elections and resolving ULP charges. . . . [The Board's] processes . . . are not set in motion until a party files a representation petition or a ULP charge.").

[21] Sec. 8(a)(1) makes it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 8(b)(1)(A) makes it an unfair labor practice for any union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Mutual Agreement to Arbitrate Claims (MAAC) in all of its forms, or revise it in all of its forms, to make clear that the MAAC does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the MAAC in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

ISS FACILITY SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-126024 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570, or by calling (202) 273–1940.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ISS FACILITY SERVICES, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

Case No. _____

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Rules of this Court, Petitioner ISS Facility Services, Inc. ("ISS") respectfully submits this Corporate Disclosure Statement. ISS is engaged in the provision of janitorial services. ISS is a wholly owned subsidiary of ISS Global A/S, which is a subsidiary of ISS World Services A/S. ISS A/S is the parent company of the ISS World Services A/S.

Dated: April 27, 2016

/s/ Alex R. Stevens

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